

FINAL STATEMENT OF REASONS
FOR RULE CHANGES UNDER THE
CORPORATE SECURITIES LAW OF 1968

As required by Section 11346.9 of the Government Code, the Commissioner of Corporations ("Commissioner") sets forth below the reasons for the adoption of subdivision (e) to Section 260.102.14 of the California Code of Regulations (10 C.C.R. Section 260.102.14).

The Corporate Securities Law of 1968 (the "CSL," Corporations Code Section 25000, et seq.) requires the offer or sale of securities in this state to be either qualified, exempt from qualification, or not subject to qualification. Section 25102(f) of the Corporations Code sets forth an exemption from the qualification requirement for transactions where (1) the sale is to 35 or fewer persons, as specified, (2) each purchaser has a preexisting relationship with the securities issuer or business or financial experience to protect his or her own interests, (3) each purchaser represents the purchase is for that person's own account, (4) the offer or sale is not accomplished through advertising, and (5) the issuer files a notice with the Department of Corporations ("Department") within 15 days of the first transaction. Rule 260.102.14 sets forth the form for the filing of the notice, and the accompanying instructions.

The adoption of subdivision (e) to Rule 260.102.14 allows for the online filing of the notice in lieu of the paper form. The subdivision provides for the submission of a Federal Employer Identification Number ("FEIN") by an issuer filing electronically, and that issuer's representative. A FEIN is necessary as a means of assigning a unique identifier to these entities within the program database so that future filings by the same entity may be easily associated with the filing. The program allows for an issuer's representative, such as a law firm, to create an account and make filings on behalf of clients.

The subdivision additionally provides that the existing instructions for the paper form of the filing are equally applicable to requests for the same information electronically, and that an electronic filing will require an irrevocable consent appointing the Commissioner to be the issuer's attorney to receive service of process under Section 25165 of the Corporations Code for issuers other than California corporations. The statute requiring the consent to service of process upon the Commissioner does not require such consent from a California corporation, and therefore the rule and online program do not require this consent. The statute further does not require the consent to service of process upon the Commissioner if the issuer already has a consent on file with the Department. However, the online program does not have the ability to confirm the existence of a consent to service of process prior to accepting the online filing, and therefore all online filings require the submission of a new consent. Because the law

does not require this consent from an issuer that already has the consent on file with the Department, an issuer that does not want to resubmit the consent may file the 25102(f) form with the Department in its paper format and forgo online filing.

The subdivision further requires an issuer to print a copy of the notice and manually sign and date the notice pursuant to the instructions in the existing rule, which specifies the individuals who may sign on behalf of an issuer. The new provisions require the notice to be executed before or at the time the electronic filing is made, and to be retained by the issuer for five years from the date of filing. Finally, the new provisions require the issuer provide the manually signed notice to the Commissioner upon request. The purpose of these provisions is to ensure that the issuer signs the form, and to ensure the Commissioner has access to the form for a reasonable period of time. Five years was determined to be a reasonable period of time to require the signed notice be kept in the issuer's books and records based upon the Securities and Exchange Commission's rule regarding forms submitted electronically which requires signed documents to be kept for 5 years. (See 17 C.F.R. Section 232.302.)

In response to comments from the public, a provision is added to the subdivision to indicate that payment is made electronically with the use of a credit card, and that the filing is not deemed made until payment is submitted. This additional language is intended to clarify the instructions for electronic filing for the public.

As initially proposed, the amendments to Rule 260.102.14 would have clarified the filing fee under Rule 260.103, clarified the time period for filing the notice, clarified the filing requirement under Corporations Code Section 25102.1(d), and made other nonsubstantive changes. However, the Department chose not to move forward with any of those changes at this time, which would have impacted more than just subdivision (e) of Rule 260.102.14. This decision was made in order to avoid changing any of the language of the January 16, 2004 emergency regulation. Therefore, any clarifying or other changes that were not adopted in the final text of this rulemaking action will be considered in that rulemaking action, to the extent the changes are consistent with that rulemaking action.

ALTERNATIVES CONSIDERED

No alternative considered by the Department would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective and less burdensome to affected private persons than the adopted regulation.

DETERMINATIONS

The Commissioner has determined that the proposed regulatory action does not impose a mandate on local agencies or school districts, which require reimbursement

pursuant to Part 7 (commencing with Section 17500) of Division 4 of the Government Code.

ADDENDUM REGARDING PUBLIC COMMENTS

No request for hearing was received during the 45-day public comment period which ended on January 5, 2004.

COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD

COMMENTOR: Richard G. Burt, Attorney and Counselor at Law, by letter dated December 19, 2003.

COMMENT 1: The commentor states that the instructions for the notice of transaction should expressly state that the filing is permitted before the first sale of the security in a transaction in this state.

RESPONSE: The Department's amendments to the originally proposed language removed all changes to the rule other than the provisions regarding electronic filing, in order to avoid any interference with the changes made in the Department's emergency regulation dated January 16, 2004. This comment is directed towards language that the Department is no longer amending in this rulemaking action – however, the Department will consider commentor's suggestion in the rulemaking action for the emergency regulation dated January 16, 2004.

COMMENT 2: The commentor objects to the language regarding the fee required if the notice is filed more than 15 days after the first sale of a security.

RESPONSE: As a result of the January 16, 2004 emergency regulation, the language of concern to the commentor has been removed from the final rule in this rulemaking action. Comments with respect to adopting a rule under Corporations Code Section 25608.3 are outside the scope of this rulemaking action. However, the Department will consider the suggestions for future rulemaking actions.

COMMENT 3: The commentor suggests that it is not clear from the notice how the fee is paid when filing electronically, when the filing is deemed made if the filing occurs on one date and payment on another, or the effect on the filing of nonpayment of the filing fee.

RESPONSE: A notice may not be submitted electronically to the Department unless it is accompanied by a credit card payment of the filing fee. The program will not allow submission. In response to the commentor's suggestions, the rule has been amended to clarify that payment is made by credit card, and that a notice is not deemed filed until payment is submitted.

COMMENTOR: Ron H. Oberndorfer, by e-mail dated December 4, 2003.

COMMENT 4: The commentor suggests that the penalty for failure to file the notice within the 15 days of issuance is excessive.

RESPONSE: This language was removed from the rule and, pursuant to emergency regulation dated January 16, 2004, no alternative filing fee is required for failing to file the notice within 15 days of the first sale a security in a transaction in this state unless the issuer intentionally disregarded the obligation to file the notice during the first 15 days after the issuance of the securities.

COMMENTOR: Douglas B. Martin, Attorney at Law, by letter dated November 24, 2003.

COMMENT 5: Commentor suggests the proposed amendment to Section 260.102.14(d) is inconsistent with the statute.

RESPONSE: This proposed amendment was removed from the rule.

No written comments were received during the 15-day public comment period when ended on February 23, 2004.

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